APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

REBA LUNOW,

Plaintiff,

vs.

FAIRCHANCE LUMBER COMPANY, a corporation; ROCKWELL-STANDARD CORPORATION, a corporation; UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation; ALLEN & HOSHALL, a co-partnership composed of Lorin B. Allen and Robert H. Hoshall,

Defendants.

No. 66-122 Civil

Memorandum Opinion

(Filed February 24, 1967)

The plaintiff Reba Lunow seeks recovery herein against the defendants for loss of consortium claimed to have been sustained by her by reason of physical injuries received by her husband, William Henry Lunow, in an accident suffered in Oklahoma and alleged to have been caused by various acts of negligence on the part of the several defendants. The plaintiff asserts that Oklahoma gives the husband a cause of action for loss of his wife's consortium under these circumstances and, therefore, Oklahoma cannot constitutionally deprive the wife of a cause of action for loss of her husband's consortium by reason of the Fifth (due process) and Fourteenth (equal protection of the laws) Amendments to the United States Constitution.

The defendants resist the action of the plaintiff alleging that no cause of action exists in Oklahoma in favor of a wife for loss of consortium and, in addition, the Oklahoma Workmen's Compensation Law (Title 85, Oklahoma Statutes, Sections 11 and 12) makes its benefits exclusive and in place of all other liability that might otherwise accrue to the employee, William Henry Lunow, and the plaintiff as his spouse.

The Court has jurisdiction based on diversity of citizenship and the involvement of the required jurisdictional amount. 28 United States Code 1332.

All defendants have filed Motions to Dismiss the Complaint herein claiming that it fails to state a claim upon which relief can be granted and some defendants additionally assert that this Court has no jurisdiction of the subject matter of this action. The parties have filed Stipulations herein setting out the relationships existing between all parties. The issues presented as to whether the plaintiff has a cause of action herein for loss of consortium and the effect of the provisions of the Oklahoma Workmen's Compensation Law on the subject matter of this litigation have been exhaustively briefed and orally argued to the Court.

The undisputed facts in this case are that the husband of the plaintiff, William Henry Lunow, was an employee of Western Steel Erection Company (not a party herein). Western Steel Erection Company (Western) was a subcontractor of the defendant Fairchance Lumber Company (Fairchance) who was the prime contractor constructing a building at Bethany, Oklahoma for the defendant Rockwell-Standard Corporation (Rockwell), the owner. The defendant Rockwell is in the airplane manufacturing business and the building was an addition to

its plant at the above location. The defendant United States Fidelity and Guaranty Company (USF&G) carried workmen's compensation insurance for the defendant Fairchance. This insurance was required by Rockwell in its contract with Fairchance and the cost thereof was paid by Rockwell under its cost plus arrangement with Fairchance for construction of the building. Under the terms of the USF&G workmen's compensation insurance policy the carrier was permitted to inspect the workplaces or the building being constructed by Fairchance. The defendant Allen & Hoshall was the engineer-architect on the project being engaged in this capacity by Rockwell. On October 26, 1964, William Henry Lunow, as an employee of Western, accidently fell from the roof of the said building being constructed and sustained serious and permanent injuries. William Henry Lunow proceeded against his immediate employer Western and its workmen's compensation insurance carrier (not a party herein) in the Oklahoma State Industrial Court by filing a claim for compensation in said Court under the Oklahoma Workmen's Compensation Law regarding his October 26, 1964, accident and resulting injuries. Mr. Lunow is receiving certain benefits under this proceeding.

In this diversity action the substantive law of Oklahoma must be applied unless such application impairs a right conferred or is in conflict with any inhibitions imposed by the Constitution and laws of the United States. *Erie Railroad Company* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Erwin* v. *Barrow*, (Tenth Cir.-1954) 217 F.2d 522.

The Oklahoma Supreme Court in *Howard* v. *Verdigris Valley Electric Co-op*, 207 P.2d 784 (1949) and *Nelson* v. *Lockett & Co.*, 243 P.2d 719 (1952), has held that a wife

in Oklahoma has no cause of action for loss of consortium. The United States Court of Appeals for the Tenth Circuit in a case under Kansas law has held that a wife has no cause of action for loss of consortium. *Criqui* v. *Blaw-Knox Corp.*, (Tenth Cir.-1963) 318 F.2d 811. A Motion to Dismiss was sustained and affirmed in this case. Each of these three cases clearly considers the matter of granting a wife a cause of action for loss of consortium as being legislative in nature and not judicial. The Oklahoma Supreme Court in the Howard case, supra, also held that the several Oklahoma women's emancipation statutes did not create in the wife a cause of action for loss of consortium.[1] And there is respectable authority that to give the wife such a cause of action is to permit a double recovery for husband and wife for the same injury.[2]

The Oklahoma holding and the Tenth Circuit holding in the Kansas case, as aforesaid, conforms with the weight

---

1. This case holds:

"* * * The underlying principle to be noted in all the cases is that whatever additional rights may have been extended to women generally under the so-called emancipation statutes, or married women's acts, such statutes do not confer a new right upon the wife which permits recovery for loss allegedly resulting from negligent injuries to her husband, since no new cause of action was created thereby.

Statutory emancipation of married women, which gave the wife equal rights with her husband, nowhere is held to give rise to such a cause of action as is herein sought to be asserted. We decline to establish a contrary rule based solely upon analogy, and thus open an entirely new field of litigation. We are not concerned with the wisdom of any legislation which might do this specifically, but we decline to do by analogy that which is not permitted by direct enactment."

2. Cases to this effect are:

Nickel v. Hardware Mutual Casualty Co., (Wis.-1955) 70 N.W.2d 205; Giggey v. Gallagher Transportation Co., (Colo.-1937) 72 P.2d 1100; Eschenback v. Benjamin, (Minn.-1935) 263 N.W. 154; Also see Restatement of the Law of Torts, Section 695 and 27 Am.Jur. 114.

of authority in this country. 23 A.L.R.2d 1378; Restatement of the Law of Torts, Section 695;[3] 27 Am. Jur. 114.[4]

---

3. This Section provides:

"SECTION 695. ACTION BY WIFE FOR HARM CAUSED BY TORT AGAINST HUSBAND.

"A married woman is not entitled to recover from one who, by his tortious conduct against her husband has become liable to him for illness or other bodily harm, for harm thereby caused to any of her marital interests or for any expense incurred in providing medical treatment for her husband.

"Comment:

"A. Although a husband is entitled to recover for the loss of his wife's services and society and any expense which he incurs as a result of illness or bodily harm caused to her by the tortious conduct of another, a wife is not entitled to a recovery under similar circumstances. The wife is not, nor has she ever been, entitled to the services of her husband. Moreover, she is not deprived of the support to which she is entitled by any tort committed against him. The husband is still legally bound to provide support for her, and the tort-feasor is liable to the husband for any loss of earning power which he may suffer. This the husband himself may recover, and were his wife permitted to recover for the loss of support, a double recovery would result. The wife has a similar interest in the society and sexual relations with her husband as he has in such relations with her. However, the law has not recognized her right to recover against one who has caused harm to such interests by conduct which is not intended to harm them. One who has negligently injured the husband, or has intentionally caused him harm, by conduct directed toward him personally rather than toward the wife's interest is not liable to the wife."

4. This authority states:

"Whatever right a wife may have by virtue of statutes removing her common law disabilities to recover for loss of consortium of her husband as a result of injuries inflicted by a third person, does not extend to loss of consortium caused by a mere negligent injury inflicted upon the husband. At least, in the absence of any statute expressly conferring it, a wife, even though able to sue and be sued as a femme sole, has no right or cause of action, as a general rule, for loss of consortium due to injuries negligently inflicted on her husband. She has no such cause of action even under a statute preserving to her all rights of action growing out of violation of her personal rights. Her loss of consortium resulting from negligence is too remote and indirect to permit her to recover therefor, and hence, it is distinguishable from loss of consortium resulting directly from a wrongful act, as where her

But the plaintiff urges that these holdings are unconstitutional and must be overruled in that they violate the equal protection of the laws provision of the Fourteenth Amendment to the United States Constitution by giving the husband this cause of action or right and withholding the same from the wife.

There is no question that the legislature of a state may grant the wife this cause of action which was not recognized at common law.[5] Therefore, those cases recognizing this right in a state and basing the recognition on legislation granting this right to a wife are not in point here and will not be discussed because the Oklahoma Supreme Court has held that no legislation in Oklahoma has given the wife this right. The plaintiff, however, cites certain cases in which the wife has been afforded a cause of action for loss of consortium without the foundation of state legislation. One case involved the District of Columbia where the Federal Courts of the District have seen fit to recognize this right in the wife as the domestic law of the District of Columbia. *Hitaffer* v. *Argonne Co.*, 183 F.2d 811, cert. denied 340 U.S. 852, 71 S.Ct. 80, 95 L.Ed. 324. A careful reading of this case results in the conclusion that the foundation of this decision was a determination by the Court of domestic policy or law in and for the District of Columbia based on female emancipation and not the command of the Fourteenth Amendment to the United States Constitution.

---

husband is wrongfully enticed, seduced, or forced away from her. Furthermore, damages to which the husband is entitled, in a suit for his injuries sustained through another's negligence, are supposed to be full compensation for his injuries in which compensation his wife has a benefit, with the consequence that if the wife is permitted a separate recovery for her loss of consortium resulting from such injuries, there is, in effect, a double recovery for the same matter."

5. The Oklahoma Legislature has not seen fit to enact such legislation since the Howard decision, supra, in 1949.

Two other cases cited are not appellate decisions. In *Clem* v. *Brown*, 207 N.E.2d 398 (1965), a Court of Common Pleas in Ohio decided that the wife should have this right in Ohio. The basis of this decision was the command of the equal protection clause of the Fourteenth Amendment[6]. The case of *Owen* v. *Illinois Baking Corporation* was before the United States District Court for the Western District of Michigan, Southern Division. This case is unreported, the Court not seeing fit to submit the same for publication in Federal Supplement. This decision recognizes the right of a wife to a cause of action for loss of consortium, cites *Hitaffer*, supra, and states that, "to grant a husband the right to sue on this right while denying the wife access to the courts in the assertion of this same right is too clearly a violation of Fourteenth Amendment equal protection guarantees to require citation of authority." Thus, this decision is based on the right in the wife being required by the equal protection clause of the Fourteenth Amendment when such right is granted to the husband. But no authority is cited for this conclusion except *Hitaffer*, supra, which as stated above was not based on the Fourteenth Amendment but rather on an interpretation of the result of female emancipation in the District of Columbia[7].

---

6. But the reasoning of the Court is not persuasive, for example:

> "I call attention to the due process clause only because it has lately been invoked to free convicts from responsibility for proven crimes even where the successful appellant has been one with an unsullied and well established general reputation for open thuggery or long continued criminal activity. Consequently, I must conclude that the protection of the 14th Amendment is no less available to Ohio's virtuous wives or to those without virtue for that matter."

7. Hitaffer provides:

> "It is therefore the opinion of this court that in light of the existing law of this jurisdiction, in light of the specious and fallacious reasoning of those cases from other jurisdictions

In the face of the Oklahoma decisions in Howard and Nelson, supra, the decision of our Circuit in Criqui, supra, and the weight of authority on this point in this country, 23 A.L.R.2d 1378, this Court is unable and is unwilling to usurp legislative prerogatives and create a new right in Oklahoma where none has previously existed.

Moreover, for the equal protection clause of the Fourteenth Amendment to be violated the classification involved must amount to an invidious discrimination and be without reasonable basis. *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); *Morey* v. *Doud*, 354 U.S. 457, 77 S.Ct. 1344, I L.Ed.2d 1485 (1957). Merely because a husband has a cause of action for loss of consortium it does not automatically follow that the wife must also have one. There must be invidious discrimination and an unreasonable classification and the entire spectrum of the marriage relationship and the basic differences and the different rights and responsibilities existing as between the spouses must be given consideration as they are all brought into play. As these differing rights and responsibilities vary among the states and are the subject of state legislative determination and control, it seems logical that the loss of consortium problem as presented here on behalf of the wife is one for state legislative action and not judicial action.

Nor can it be said in the light of the overall marriage relationship, the basic differences between the spouses and the different rights and responsibilities as between the spouses that invidious discrimination and an unreasonable classification is inherent in allowing the hus-

---

which have decided the question, and in light of the demonstratable desirability of the rule under the circumstances, a wife has a cause of action for loss of consortium due to a negligent injury to her husband."

band to recover for loss of consortium and recognize no such cause of action in the wife. See the recent case of *Krohn* v. *Richardson-Merrill, Inc.*, (Tenn.-1966) 406 S.W. 2d 166.

It is, therefore, concluded that a state may afford the husband a cause of action for loss of consortium and not afford such a cause of action to the wife and that such is consistent with the equal protection clause of the Federal Constitution. Such is not an invidious discrimination and the classification has a reasonable basis under the circumstances.

Thus, this diversity action is governed by the law of Oklahoma, Oklahoma has not given the wife a cause of action for loss of consortium and this condition does not offend the Federal Constitution even though such a cause of action is given the husband. It follows that the Complaint of the plaintiff fails to state a claim upon which relief may be granted and the same must be dismissed on the Motions of the defendants. This determination makes it unnecessary to treat with the second issue raised herein by the defendants regarding the effect of the provisions of the Oklahoma Workmen's Compensation Law which provide that its benefits are exclusive as to an injured employee and his spouse.

The Complaint of the plaintiff is dismissed.

Dated this 24 day of February, 1967.

/s/ Fred Daugherty
United States District Judge

Judgment Entered In Civil Docket on Feb. 24, 1967.

/s/ Adelaide Holston
Deputy

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANUARY 1967 TERM

REBA LUNOW,

Appellant,

vs.

FAIRCHANCE LUMBER COMPANY, a corporation; ROCKWELL - STANDARD CORPORATION, a corporation; UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation; ALLEN & HOSHALL, a co-partnership, Composed of Lorin B. Allen and Robert H. Hoshall,

Appellees.

No. 9400

(Filed February 9, 1968)

Appeal from the United States District Court for the Western District of Oklahoma

Leslie L. Conner (James M. Little and Leslie L. Conner, Jr. with him on brief) for Appellant.

Jerome E. Hemry for Appellee Rockwell-Standard Corporation.

Clayton B. Pierce (Lynn J. Bullis with him on brief) for Appellee Allen & Hoshall.

Edgar Fenton (Elliott C. Fenton with him on brief) for Appellees Fairchance Lumber Company and United States Fidelity and Guaranty Company.

Before MURRAH, Chief Judge, BROWN* and HICKEY, Circuit Judges. MURRAH, Chief Judge

*Chief Judge for the Fifth Circuit sitting by designation.

This appellant-wife asserts a right of action against each and all of the appellees for loss of consortium by reason of negligent harm to her husband while in the course of his employment in Oklahoma. The injuries and resulting disability are compensable under the Oklahoma Workmen's Compensation Act. The husband, William Henry Lunow, is being duly paid and his employer is not involved in this action. The action is against appellees as third party tort feasors.

It seems to be conceded that in harmony with general law Oklahoma gives a common law right of action for loss of consortium in favor of a husband but withholds it from the wife. See Howard v. Verdigris Valley Electric Co-Op, 207 P.2d 784; And see also Criqui v. Blaw-Knox Corporation, et al., 318 F.2d 811; Anno. 23 A.L.R.2d 1378; Restatement of Torts §695. This discrimination is said to work a deprivation of equal protection of the laws and a denial of due process of law and to compel a right of action in the wife equivalent to that of the husband in the same or similar circumstances. The motion to dismiss on stipulated facts is two-fold: (1) The Workmen's Compensation benefits provided and paid to the injured husband are exclusive and in place of all common law liability of all of the appellees. The husband does not, therefore, have a right of action in the same circumstances, hence no constitutional right is involved. (2) Oklahoma may, consistently with due process and equal protection of the laws, afford a husband a remedy for loss of consortium while denying it to the wife.

The trial court dismissed the action on the latter ground and did not reach the former. We think the first defense is foremost and decisive, for if a statutory interpretation obviates the necessity for deciding a constitu-

tional issue, we are bound to pursue that course. See Alma Motor Co. v. Timken Co., 329 U.S. 129, 136, and cases cited. And, if, as we think, the judgment of the court can be sustained by statutory interpretation, it should be affirmed even though the trial judge chose the constitutional ground for his decision. And see Kanatser v. Chrysler Corp., 199 F.2d 610; Texaco, Inc. v. Holsinger, 336 F.2d 230.

The pertinent facts are that appellee Rockwell-Standard Corporation, a manufacturer of airplanes in Oklahoma County, Oklahoma, contracted with appellee Fairchance Lumber Company to construct an addition to its plant building according to plans and specifications prepared by appellee Allen & Hoshall. The contract required Fairchance to secure and maintain Workmen's Compensation for its employees, and Fairchance secured such insurance covering workmen on the construction job from appellee United States Fidelity and Guaranty Company. Fairchance subcontracted a part of its contract to the Western Steel Erection Company and required Western Steel to provide Workmen's Compensation to its employees. The husband was injured in the course of his employment with Western Steel and, as we have seen, is now being paid Workmen's Compensation.

Section 11 of the Oklahoma Workmen's Compensation Law expressly provides that an independent contractor shall be liable for Workmen's Compensation due to his direct employees or the employees of any subcontractor. And, the principal employer is also liable in a manner specified for compensation due all direct employees, employees of an independent contractor, subcontractor or other employees engaged in the principal employer's business. This same section also provides that

any person entitled to compensation shall have the right to recover same directly from his immediate employer, the independent contractor or intermediate contractor. And, if the principal employer fails to require compliance with the law by his independent contractor, an employee may proceed against the principal employer without regard to liability of any independent, intermediate or other contractor. Section 12 of the Act provides that the liability prescribed in section 11 shall be "exclusive and in place of all other liability of the employer * * * at common law or otherwise for * * * injury, loss of services * * * to the employee, spouse * * * or any other person * * *."

We are convinced that the liability imposed upon Rockwell and Fairchance by the Workmen's Compensation law is exclusive of all common law liability to either the husband or wife, hence there can be no unconstitutional discrimination between them.

As an independent contractor, Fairchance was, by force of Section 11, at all times liable for compensation due the employees of its subcontractor Western Erection, including Lunow. In the circumstances of this case it was manifestly secondarily liable, hence immune from any common law liability whatsoever.

We have read the Oklahoma decisions to liberally construe Sections 11 and 12 also to immunize a "principal employer" such as Rockwell of all tort liability for any injury occurring to an employee of its independent contractor or a subcontractor in the course of his employment, provided the work being performed is an integral part of or necessarily connected with the business of the principal employer. See Burk v. Cities Service Oil Company of Delaware, 266 F.2d 433, and Oklahoma cases cited there; see also Thomas v. Farnsworth-Chambers Co., 286 F.2d 270; Skelly Oil Co. v. District Court, 401 P.2d 526.

Construing federal law of similar text, we have said that the liability of the United States under §757(b) of the Federal Employees' Compensation Act, 5 U.S.C. 751 et seq. is exclusive of any liability of an employer under the Act to a husband for the loss of his wife's consortium. See Underwood v. United States, 207 F.2d 862; see also United States v. Browning, 359 F.2d 937. We thus expressly declined to follow Hitaffer v. Argonne Co., 183 F.2d 811, relied upon here by appellant. And, that case has since been expressly overruled. See Smithers and Company, Inc. v. Coles, 242 F.2d 220. We are thus confident that Rockwell and Fairchance are immune from the common law liability asserted here.

As the Workmen's Compensation carrier for Fairchance, appellee United States Fidelity & Guaranty Company undertook to pay any losses incurred within the coverage of the policy. As to that, its liability is exactly commensurate with that of its insured. Indeed, the Oklahoma court has emphatically said that "An insurance carrier may under the Workmen's Compensation Law, make the same defenses as are available to the employer and may not be held liable where the employer is not liable." Van Zant v. State Insurance Fund, 223 P.2d 111; and see Board of County Commissioners of Adair County v. Ragg, Adm'x, 147 P.2d 157.

Appellees Allen & Hoshall are alleged to have committed numerous and specific acts of negligence contributing to the husband's injuries. But, as architects employed by Rockwell, they were the agents of their employer, i.e. see 6 C.J.S. Architects, §7. And, it seems to be alleged and conceded that the alleged negligent acts were performed in the course of their employment. Any acts of negligence were, therefore, directly attributable to Rockwell which we have held to be immune from the asserted liability.

The judgment is affirmed.